No. 6442

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN LIFE INSURANCE COMPANY (a corporation),

Appellant,

vs.

EMMA C. KING,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Authorities Cited

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To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant respectfully petitions this Court for a rehearing of its appeal in the above-entitled matter, and submits the following in support thereof:

We believe that the decision heretofore rendered, the opinion being filed November 9, 1931, constitutes not only a departure from the current of decisions upon the questions involved but likewise constitutes a definite step in the undermining of the basic plan upon which life insurance has been developed.

In many forms of insurance there is involved little, if any, selection of risks, whereas selection of risk is a fundamental factor in life insurance.

The policy issued to the decedent, Kasshafer, was one issued to a selected risk. It is true that sometimes insurance in limited amounts is written without physical examination by a physician, but that was not the kind of policy applied for by the deceased, and even in that form of policy there is a certain selection of risk through the medium of statements made by the assured in the application. Kasshafer desired and applied for a policy upon the selected risk basis, involving not only examination by a physician touching the immediate condition of his health, but in addition statements upon the same subject to be made by him.

We cheerfully concede that if the questions propounded to him were ambiguous so that an honest mistake might well be made in answers to them, the party of the contract bringing about the ambiguity should be the one to suffer if that mistake occurred or could reasonably be held to have occurred. Consequently it has been held, as has been pointed out in the opinion of this Court, that where questions are asked as to the existence, past or present, of specific diseases, considerable latitude would have to be allowed because the answer calls for a decision by the applicant upon matters with which such applicant might well be without accurate information; so, in those cases referred to in the opinion, where the questions were as to whether or not the applicant had suffered from specific diseases, such as "affection of the liver" and the applicant answered "No," the Courts hold that the question of good faith is not concluded by proving that the applicant actually had suffered from the disease but that it must go farther

and determine whether or not the attack constituted a material illness or malady having some direct and unmistakable bearing on the health of the applicant.

Such a rule is reasonable because the inquiry goes into matters about which a layman may be poorly, or not at all, informed. This rule was declared a long time ago in such cases as those cited in the opinion, as, for instance, *Connecticut Life Ins. Co. v. Union Trust Co.,* 112 U. S. 250, and it was because of such rulings that companies began to change the form of the questions. This they did, not because they did not want the information, which was actually vital to the successful conduct of the business of insuring lives, but because in view of the rule the answers to those questions could no longer be depended upon in the selection of the risk. Consequently applicants, in application forms such as was used in the case at bar were required to name the sources to which the insurer might go to determine whether or not the proffered risk was acceptable. And surely even a layman cannot be mistaken as to the names and the number of physicians consulted by him within a reasonably short period of time, which in the case of the application under consideration was fixed at three years. This is knowledge which the applicant has and which the insurer cannot possess. It is not asked for an idle purpose. It is a question which the insurer deems material. Its truthful answer is a reasonable requirement, and persons of the most limited intelligence cannot fail to understand it. It calls for no conclusion or reasoning by the applicant as to whether or not the illness treated or concerning the existence

of which the consultation was required, and the applicant has no right in common honesty to indulge in speculations concerning its materiality. It is far less effort for him to answer the question and speculation upon its materiality by the applicant indicates only an intention to withhold information requested. It can have no other basis.

We submit that cases such as *Connecticut Life Ins. Co. v. Union Trust Co.,* supra, have not the slightest application in the case at bar, and we respectfully assert that it is not for this Court in its determination of this case to say, "Was it obligatory upon the insured to disclose to the medical examiner acting for the insurance company the facts regarding his visits to Dr. Hess, considering his condition at the time of such visits?"

It was not for the applicant, in the beginning, if he were to act honestly, to consider "his condition at the time of such visits." He was not asked about that. He was asked if he had made the visits, the plain and only purpose of the question being to enable the insurer to make its own investigation concerning his condition at the time of such visits. To give to the assured the right of such consideration and the right to determine it is to destroy the basis of the contract between the parties, and to permit Courts and juries after the death of the assured to consider the assured's "condition at the time of such visits" is only again to deny to the insurer its right to consider for itself the acceptability of the applicant for insurance. It is to deny to the insurer the right to honestly and intelligently conduct its own business. It is to sub-

stitute the judgment of Courts and juries naturally and humanly favorable to the beneficiary as to how the business of the insurer should be run. It is to do violence to and to sweep away the basis of contracts of insurance. It is to confuse materiality of the question asked with materiality as to the effect of conditions upon the acceptability of the risk as those may have to be determined by evidence introduced long after the insurer has been denied its right to pass upon that matter. It is to violate the express mandate of the law under which this policy was written as embodied in Section 2564 of the Civil Code of California, which, after declaring that a party is guilty of concealment in respect of insurance contracts if he neglects to communicate that which he ought to communicate, excludes certain matters as to which he is not bound to answer "except in answer to the inquiries of the others"; that is to say, that he is bound to disclose where inquiry is made.

This Court, in holding that Kasshafer was not obligated to disclose the fact of his visits to Dr. Hess, relies upon *Bankers Life Co. v. Hollister* and *Wharton v. Aetna Life Ins. Co.,* both cited in the opinion.

These cases are cited as holding that an applicant for insurance in answer to a question as to whether he has consulted a physician, is not required to tell of consultation or treatment for slight or temporary indispositions, such as colds, insomnia, headache, constipation or the like.

We submit that these cases furnish no authority for declaring that Kasshafer was not obligated to disclose his consultations with Dr. Hess.

In the *Bankers Life* case the inquiry was so worded that it was held that the applicant could infer the consultations being asked about related to certain specific illnesses as to which inquiry was made, thus putting that case in the same class as the *Connecticut Life Ins. Co.* case discussed above.

It is then stated in the opinion that consultations for slight or temporary illness, such as ordinary colds or inability to sleep, should not, if not disclosed, avoid a policy, but nothing is said as to the form of the inquiry.

In the *Wharton* case the decision again turned, not upon the necessity for answering plain questions concerning consultations, but upon the form of the inquiry.

None of these cases are authority for declaring here that Kasshafer did not owe the obligation to disclose his visits to Dr. Hess. The testimony, without dispute, shows that he consulted Dr. Hess because he believed he was suffering a recurrence of peptic ulcer, gave to that physician a complete history of a preceding illness of peptic ulcer, which that physician accepted and upon which he based his treatment, which was continuous and was going on at the very time this application was made.

We respectfully submit, further, that this Court's analysis of the testimony contained in the concluding portion of its opinion as to what the testimony in the case shows with respect to the condition of Kasshafer at that time, is not a correct analysis of the evidence. It is true, as this Court has said, that Kasshafer

complained of indigestion and gas in the abdominal region but he also talked of ulcer and gave its precedent history. This Court says there were no symptoms of that disease present. Dr. Hess never determined that, because as he said, he accepted the history of peptic ulcer and based his treatment upon it. For that reason he made no critical examination. His treatment was based on the assumption of the existence of peptic ulcer or of the conditions precedent to its occurrence. Certainly Kasshafer was concerned about the recurrence of peptic ulcer; certainly that concern took him to Dr. Hess; certainly he received treatment based upon the theory that peptic ulcer was recurring or threatening; and yet with all this knowledge, the Court holds that he could honestly conceal that treatment and those consultations and was not obligated in any manner to disclose them.

Kasshafer is made the party to decide his acceptability as a risk for insurance, and whether he was right or not is finally to be submitted to the arbitrament of a tribunal sitting upon the matter after the risk has been incurred. The insurance company is required to abdicate and surrender itself to the beliefs and conclusions of the applicant. Life insurance business cannot be conducted upon any such basis.

What we have said here applies equally, we submit, to this Court's conclusion that it might be reasonably inferred that Kasshafer understood the statement as to his visits to Dr. Hess were not required to be given at that time. We do not know what is meant by "at that time." With no other time are we concerned.

Why is Kasshafer given the right, when inquiry is made concerning consultation with physicians, to select which physicians he shall name? Why is he given the right to choose the consultations as to which he shall make disclosure, if in fact there be more than one?

Kasshafer was then under treatment by another physician, whom he did not name. The matter could not have been absent from his mind. He knew what he was there for. He could not have misunderstood the question. He had no right to conceal the required information.

It should not be forgotten, as, we submit, it has been forgotten, that Kasshafer was not being asked about diseases but about consultations with physicians. As a layman he knew exactly what was meant; as a patient of Dr. Hess he knew he had not answered.

Nothing more than knowledge of falsity need be proven against him to convict him of intent to deceive.

> "Considered in most favorable light possible, the above quoted incorrect statements in the application are material representations, and nothing else appearing, if known to be untrue by assured when made, invalidate the policy without further proof of actual conscious design to defraud."
>
> *Mutual Life Ins. Co. v. Green,* 241 U. S. 676.

We respectfully submit that a rehearing be granted in this matter.

Dated, Sacramento,
December 7, 1931.

BUTLER, VAN DYKE, DESMOND & HARRIS,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Sacramento,
December 7, 1931.

B. F. VAN DYKE,
Of Counsel for Appellant and Petitioner.